Re Lo Siong Fong

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) PETITION NO D3-28-318-93
VC GEORGE J
20 JANUARY 1994

Companies and Corporations — *Winding up — Just and equitable rule — Petitioner removed as managing director — Whether petitioner could rely on legitimate expectation to manage company — Companies Act 1965 s 218*

Companies and Corporations — *Winding up — Quasi partnership — Company carried on as partnership — Whether partnership relationship recognized by the courts*

Companies and Corporations — *Winding up — Injunction to restrain petition — Petition brought for collateral purpose*

Companies and Corporations — *Winding up — Provisional liquidator — Setting aside appointment — Appointment obtained through non-disclosure of material fact*

Civil Procedure — *Striking out — Winding up petition — Whether O 18 r 19 of the Rules of the High Court 1980 applicable — Effect of Companies (Winding Up) Rules 1972 — Inherent jurisdiction of court — Companies (Winding Up) Rules 1972 — Rules of the High Court 1980 O 18 r 19*

The petitioner sought to have the company, Federal Paint Factory Sdn Bhd ('Federal Paints'), wound up on the grounds of justice and equity. The petitioner had earlier obtained an ex parte order to place Federal Paints in the hands of provisional liquidators on the ground that a company, Sigma Coating BV, had entered into a licence agreement with Federal Paints and would probably terminate the agreement because of the change in management in Federal Paints. The petitioner however failed to disclose to the court that the agreement also entitled Sigma Coating BV to terminate the agreement in the event a provisional liquidator was appointed. Federal Paints and some of its contributories sought to have the order appointing the provisional liquidator set aside and a permanent injunction restraining the petitioner from further acting on or prosecuting the winding-up petition.

Federal Paints was incorporated in 1958 at the instance of the heads of the Lo, How and Foong families, respectively. Although the company was incorporated under the Companies Act, in effect the business of the company was carried on as a partnership with Lo Yung Sin, the then head of the Lo family, being the only active partner and who was the managing director and chairman of the company until his death in 1972. The petitioner stated that the How and the Foong families had reposed full confidence and trust in Lo Yung Sin and the Lo family to manage the company and its business.

The linchpin of the petitioner's case was his contention that although the memorandum and articles of the company did not so provide, it was always understood by the shareholders of the company that the

A management of the company would be in the hands of the Lo family and that a Lo would be its managing director and that because the petitioner had taken over the management of the Lo family holding company (Century Enterprises Co (Pte) Ltd), he was entitled to be the managing director of Federal Paints as well. The petitioner had been the managing director of Federal Paints from 1980 until 29 September 1993 when, at a general meeting of the company, he was removed as a director, apparently due to a falling out among the members of the Lo family.

Held, setting aside the appointment of the provisional liquidator and ordering a permanent stay of the petition:

(1) The courts recognize situations where the relationship between the parties results in what is really a partnership taking the form of an incorporated company. However, the unity of the Lo family had been split asunder and it had divested itself of a substantial portion of its shareholding in Federal Paints. It was hardly surprising if the Hows and the Foongs ceased to continue to repose any confidence or trust in the Lo family. The relationship had been altered beyond recognition and that the quasi partnership had remetamorphosed to being an incorporated company not only in form but in fact as well.

(2) The petitioner's reliance on a legitimate expectation to manage Federal Paints was clearly misplaced. The accounts of Federal Paints showed that with the petitioner at the helm, the company had accumulated losses. That put paid to the suggestion that the applicants were being unfair in trying to get rid of the petitioner and lent support to the contention that the applicants were justified in a commercial sense in getting rid of him. Therefore, the petition ought to be stopped *in limine*.

(3) The petition was brought for the collateral purpose of impeding the applicants from proceeding with their other application for an order that the petitioner and other directors aligned with him sell off their shares in the company to the other shareholders on the grounds they had been acting in a manner oppressive to the other members. In all the circumstances, the petition ought to be stopped in its tracks and the petitioner was restrained from advertising or gazetting the petition and from further prosecuting it.

(4) The purpose for the appointment of a provisional liquidator is primarily to preserve the assets and otherwise maintain the status quo pending the determination of the petition to wind up the company. Not disclosing to the court that the agreement with Sigma Coating BV also entitled it to terminate the agreement in the event a provisional liquidator was appointed was a material non-disclosure. There was also nothing to justify the application being made ex parte. As the petition had no hope of being successfully prosecuted, the appointment of the provisional liquidator was set aside.

Per curiam:

Order 18 r 19 of the Rules of the High Court 1980 ('the RHC') provides the court with specific jurisdiction to strike out proceedings that are frivolous or an abuse of the process. However O 2 r 2(2) provides that the RHC shall not have effect in relation to proceedings in respect of which rules have been made for the specific purpose of such proceedings. As the Companies (Winding Up) Rules 1972 have been made in respect of winding-up petitions, it follows that O 18 r 19 per se has no application to a s 218 petition. One has to look to the winding-up rules and those rules do not per se empower the court to strike out a petition that is an abuse of the process. However, the court has the inherent jurisdiction to strike out any abuse of its process.

[**Bahasa Malaysia summary**

Pempetisyen telah memohon supaya syarikat Federal Paint Factory Sdn Bhd ('Federal Paints') digulung atas dasar keadilan dan ekuiti. Pempetisyen telah terlebih dahulu mendapat suatu perintah ex parte untuk meletakkan Federal Paints dalam tangan penyelesai sementara atas dasar bahawa suatu syarikat yang bernama Sigma Coating BV telah mengikat suatu perjanjian lesen dengan Federal Paints dan mungkin akan menamatkan perjanjian itu kerana penukaran di dalam pengurusan Federal Paints itu. Akan tetapi pempetisyen gagal mendedahkan kepada mahkamah bahawa perjanjian itu juga memberi Sigma Coating BV hak untuk menamatkan perjanjian itu jika penyelesai sementara dilantik. Federal Paints dan beberapa daripada penyumbangnya telah memohon supaya perintah perlantikan penyelesai sementara itu diketepikan dan suatu injunksi kekal untuk menahan pempetisyen daripada bertindak selanjutnya atas atau mendakwa petisyen penggulungan itu.

Federal Paints telah diperbadankan pada tahun 1958 atas usul ketua-ketua keluarga Lo, How and Foong, masing-masing. Walaupun syarikat itu telah diperbadankan di bawah Akta Syarikat, perniagaan syarikat itu pada hakikatnya telah dijalankan sebagai suatu perkongsian dengan Lo Yung Sin, ketua keluarga Lo pada masa itu, sebagai rakan kongsi tunggal yang aktif dan beliau merupakan pengarah urusan dan pengerusi syarikat itu sehingga beliau meninggal dunia pada tahun 1972. Pempetisyen berkata bahawa keluarga How dan Foong telah menanam keyakinan dan kepercayaan yang penuh di dalam Lo Yung Sin dan keluarga Lo untuk mengurus syarikat dan perniagaan itu.

Isi penting kes pempetisyen adalah penegasannya bahawa walaupun memorandum dan perkara persatuan syarikat itu tidak memperuntukkan sedemikian, adalah difahami oleh semua pemegang saham syarikat itu bahawa pengururan syarikat itu akan berada dalam tangan keluarga Lo dan bahawa seorang daripada keluarga Lo akan menjadi pengarah urusannya dan oleh kerana pempetisyen telah mengambilalih pengurusan syarikat induk keluarga Lo (Century Enterprises Co (Pte) Ltd), beliau berhak menjadi pengarah urusan

A Federal Paints juga. Pempetisyen telah menjadi pengarah urusan Federal Paints dari tahun 1980 hingga 29 September 1993 apabila, pada suatu mesyuarat agung syarikat itu, beliau telah disingkirkan dari jawatannya sebagai pengarah, kononnya kerana suatu pergaduhan antara ahli-ahli keluarga Lo.

B **Diputuskan**, mengetepikan perlantikan penyelesai sementara dan memerintahkan suatu penggantungan kekal petisyen itu:

(1) Mahkamah mengiktiraf keadaan di mana perhubungan di antara pihak-pihak mengakibatkan sesuatu yang sebenarnya suatu perkongsian mengambil bentuk suatu syarikat yang diperbadankan.
C Bagaimanapun, perpaduan keluarga Lo telah dipecah-belahkan dan ianya juga telah melucutkan sebahagian besar daripada saham Federal Paints yang dipegang olehnya. Adalah tidak menghairankan jika keluarga How dan Foong tidak lagi menanam sebarang keyakinan atau kepercayaan di dalam keluarga Lo.
D Perhubungan itu telah diubah sehingga tidak lagi dapat dikenal dan kuasi-perkongsian itu telah berubah semula menjadi suatu syarikat yang diperbadankan bukan sahaja dalam bentuk tetapi juga pada hakikatnya.

(2) Pergantungan pempetisyen atas suatu harapan sah untuk mengurus Federal Paints itu jelas disalahletakkan. Akaun Federal Paints
E menunjukkan bahawa semasa pempetisyen menjadi pengetua, syarikat itu telah mengalami kerugian. Itu tidak menyokong cadangan bahawa pemohon berlaku tidak adil apabila mencuba menyingkir pempetisyen dan menyokong penegasan bahawa pemohon berjustifikasi dari segi komersil untuk menyingkir beliau. Oleh itu, petisyen itu patut dihentikan *in limine*.

F (3) Petisyen itu telah dibawa untuk tujuan kolateral supaya menghalang pemohon daripada meneruskan permohonan mereka yang lain itu untuk suatu perintah supaya pempetisyen dan pengarah lain yang memihak kepadanya menjual saham mereka di dalam syarikat itu kepada pemegang saham lain atas alasan bahawa mereka telah
G bertindak secara yang menindas terhadap ahli yang lain. Memandangkan keadaan keseluruhannya, petisyen itu seharusnya dihentikan dan pempetisyen dihalang daripada mengiklan atau mewartakan petisyen itu dan daripada mendakwanya selanjutnya.

(4) Tujuan perlantikan suatu penyelesai sementara adalah terutamanya untuk memelihara aset dan status quo sementara menunggu
H keputusan mengenai petisyen untuk menggulung syarikat itu. Tindakan tidak mendedahan kepada mahkamah bahawa perjanjian dengan Sigma Coating BV juga memperuntukkan bahawa ia berhak menamatkan perjanjian itu jika penyelesai sementara dilantik, merupakan suatu ketidakdedahan material. Juga tidak
I terdapat apa-apa untuk menjustifikasi permohonan itu dibuat secara ex parte. Oleh kerana petisyen itu langsung tidak boleh didakwa dengan berjayanya, perlantikan penyelesai sementara itu diketepikan.

Per curiam:
Aturan 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT) memberikan mahkamah bidang kuasa spesifik untuk membatalkan prosiding yang remeh dan yang merupakan suatu penyalahgunaan proses mahkamah. Bagaimanapun, A 2 k 2(2) memperuntukkan bahawa KMT tidak berkesan berkaitan dalam prosiding dimana kaedah-kaedah telah dibuat untuk tujuan spesifik prosiding itu. Oleh kerana Kaedah-Kaedah (Penggulungan) Syarikat 1972 telah dibuat berkaitan dengan petisyen penggulungan, A 18 k 19 secara per se tidak terpakai kepada suatu petisyen di bawah s 218. Seseorang itu terpaksa melihat kepada kaedah-kaedah penggulungan dan kaedah-kaedah itu tidak secara per se memberi kuasa kepada mahkamah untuk membatalkan suatu petisyen yang merupakan penyalahgunaan proses mahkamah. Bagaimanapun, mahkamah mempunyai bidang kuasa sedia ada untuk membatalkan sebarang penyalahgunaan prosesnya.]

Notes
For a case on striking out a winding-up petition, see 2 *Mallal's Digest* (4th Ed) para 2153.
For a case on winding-up on just and equitable grounds, see 3 *Mallal's Digest* (4th Ed) para 265.

Cases referred to
1 *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 (refd)
2 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289 (refd)
3 *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 (folld)
4 *Re A Company* [1894] 2 Ch 349 (folld)
5 *South Downs Packers Pty Ltd v Beaver* (1984) 8 ACLR 990 (folld)

Legislation referred to
Rules of the High Court 1980 O 2 r 2(2)

SC Loh (*Ranjit Singh* with him) (*Cheang & Ariff*) for the company/contributories/applicants.
G Sri Ram (*Joseph Yeo* and *David Morais* with him) (*Joseph Yeo & Logan Sabapathy*) for the petitioner/respondent.
MS Murthi (*Murthi & Partners*) for the provisional liquidator.

VC George J: This is a s 218(1) of the Companies Act 1965 petition presented on 23 September 1993 by which the petitioner seeks to have the company Federal Paint Factory Sdn Bhd ('Federal Paints') wound up on the ground that in justice and equity it should be so wound up. The petitioner had also filed an ex parte summons, also on 23 September 1993, to place Federal Paints in the hands of provisional liquidators. This was heard ex parte on 27 September 1993 and the orders sought were granted. By encl (11), Federal Paints and certain of its contributories who between

A them hold 62% of the issued capital of the company, seek to have the order appointing the provisional liquidator set aside. Enclosure (12) heard together with encl (11) is the application by Federal Paints and the said contributories seeking a permanent injunction restraining the petitioner from further acting on or prosecuting the petition or advertising or gazetting it.

B Going by what the petitioner says, Federal Paints was incorporated in 1958 at the instance of the heads of the three families referred to in the petition as the Lo, the How and the Foong families, respectively. The prime mover of the adventure was Lo Yung Sin alias Law Wing Sum, the then head of the Lo family. The main object of the new company was the manufacture and sale of paints and related products. Although there was C incorporation of the company under the Companies Act, in effect the business of the company was to be and was carried on as if it were a partnership with Lo Yung Sin being the only active partner, the other two founder members functioning only as passive partners. The petitioner goes on to state in para 18 of the petition that the How and the Foong families 'reposed full confidence and trust' in Lo Yung Sin and the Lo family 'to D manage the company and its business'. Lo Yung Sin was, not surprisingly, appointed as the founder managing director and chairman of the company and functioned as such until his death in 1972 when his eldest son, Lo Foeng Fong, also known as Law Tam Fong, became managing director and functioned as such until the end of 1976 when he resigned as managing E director but continued to serve as a director. At that time there was on the board of the company, at least one other Lo, namely, Lo Kian Fong.

Now, the linchpin of the petitioner's case is his contention which, shortly stated, is that although the memorandum and articles of the company do not so provide, it was always understood by the shareholders of the company that the management of the company would be in the hands of the Lo F family and that a Lo would be its managing director and that because the petitioner had taken over the management of what is referred to by the petitioner as the Lo family holding company (Century Enterprises Co (Pte) Ltd) a fortiori (as it were) he was entitled to be the managing director of Federal Paints as well.

G Inconsistent with the petitioner's contention that it was understood that the Lo family led by a Lo would always manage Federal Paints, it is seen (as was pointed out by the petitioner himself in the petition) that when Lo Foeng Fong resigned as managing director in December 1976 — due to pressure of work in his other businesses — it was not a Lo who took over as chairman and managing director but a How, namely How Swee. According H to the petitioner, this was only to be a temporary measure for the reason that neither he nor his brother, Lo Kian Fong, were available to take over. However the minutes of the relevant board meeting — of 27 January 1977 — show that Lo Kian Fong was at the relevant time not only a director of the company but was in fact present at the meeting. He does not appear to I have protested the proposal by his stepmother that How Swee be appointed managing director. There is nothing in the minutes to suggest that Lo Kian Fong was not available to be managing director. It is also to be noted that the proposer of the motion to appoint How Swee as managing director can

in fact be said to be a Lo in that she was the widow of the founder member, Lo Yung Sin, and had participated at that meeting in her own capacity as a director as well as proxy for another Lo, namely, Lo Foeng Fong, the outgoing managing director who was then the senior member of the Lo family. A

The minutes of the board meeting show that if the appointment of How Swee as managing director was to be temporary, it was not for the reason suggested by the petitioner but because How Swee had taken the view that he was not confident that he could cope as managing director. As it turned out, he apparently coped and coped very well indeed because he was at the helm of the affairs of the company until he was, according to the minutes of the relevant board meeting on 29 January 1980, forced to retire on the advice of his doctors. It would even appear to be that some attempt was made to dissuade him from retiring — this, I think, is the inference to be drawn from it being minuted that How Swee had stated that his decision was final. The board went on to note with regret 'that Mr How Swee due to health reasons has to relinquish his directorship in the company which, after he took over as managing director, had gone through a complete reorganization. Since then, there has been steady increase in volume of business and the performance of the company would soon achieve an improved result.' B C D

The petitioner took over as managing director of Federal Paints sometime in 1980. He says that this was 'pursuant to a meeting of the board of directors of Century, the Lo family holding company'. The minutes of that meeting do not specifically show this to be the case. What it shows is that the petitioner was appointed secretary of the company and that he was to take charge of 'the subsidiary companies'. Be that as it may, the petitioner did function as the managing director of Federal Paints until 29 September 1993 when, at a general meeting of the company, he was removed as a director. Notice of that meeting was given on or about 26 August 1993. It is conceded by the petitioner that it was obvious that the persons at whose instance the meeting was convened would succeed in their motion to have the petitioner removed. Clearly it was in anticipation of that result that the petitioner had caused the petition herein to be presented on 23 September 1993 and that he had on 28 September 1993 (ie one day before the meeting on 29 September) sought and had obtained the ex parte order placing the affairs of Federal Paints in the hands of a provisional liquidator. E F G

It was conceded on behalf of the respondents that Federal Paints when it first commenced business in 1958 may have in effect been a quasi partnership with the Lo family holding the majority of the shares and the head of the Lo family the only active 'partner' and, as managing director and chairman, was in effect the 'managing partner'. That the courts recognize that kind of situation is seen from cases such as *Re Yenidje Tobacco Co Ltd*[1] and *Ebrahimi v Westbourne Galleries Ltd.*[2] It is the relationship between the parties that results in what is really a partnership taking the form of an incorporated company. However, it cannot be denied that alterations in the relationship can happen that could have the effect of putting paid to the equitable obligations that were allowed to override the rights and duties H I

A imposed by the memorandum and articles of association of the company and the laws pertaining to companies. Young J in the Australian (Supreme Court of NSW) case, *Morgan v 45 Flers Avenue Pty Ltd*,[3] referred to *Re Yenidje Tobacco*[1] and *Ebrahimi*[2] to say:

> The kernel of the two decisions referred to is that even though what is really a
> B partnership has in law taken the form of an incorporated company, and even though the primary obligations which govern the parties are legal obligations arising out of the articles of association and the law of companies there may still be superimposition of equitable obligations between the parties: see the *Westbourne Galleries* case at p 379. Lord Wilberforce at that page indicated that three elements would often be found in a case which would give rise to such equitable
> C considerations. However merely because these three elements may exist in a particular case does not mean that the court will draw the inference that there were superimposed equitable obligations on the company law rights and duties, nor will the court assume that just because that once was the case, that it is so for all time because it is always competent for the parties to alter their relationship.

D In the instant case, sometime during the period that the petitioner was the managing director of the company, there appeared to have been a falling out among the members of the Lo family. The petitioner himself refers to the falling out as the 'family dispute' and devotes paras 24–30 of the petition to the dispute alleging therein, inter alia, to what in effect is fraud on the part of his father's widow and of the elder brother aligning himself
E with the fraudulent widow against the two younger sons in court proceedings over the estate of the deceased Lo, the elder. For the purposes of this judgment, it is not necessary to go into the details of the allegations or to consider their merits. It is sufficient to repeat the petitioner's own conclusion set out at para 30 of the petition:

> F In consequence of these proceedings, the family relationship between LFF (ie Lo Foeng Fong) with your petitioner has irretrievably broken down.

It has been seen that when Federal Paints was incorporated in 1958, according to the petitioner as set out in para 18 of the petition, the Hows and the Foongs had 'reposed full confidence and trust in your petitioner's
G father and his family to manage the company and its business'. This state of affairs has to be compared with the situation that obtained in the 1980s. The unity of the Lo family had been split asunder with their 'family relationship ... irretrievably broken down'. In that situation, it would not be surprising if the Hows and the Foongs ceased to continue to repose any confidence or trust in the Lo family. Compounding this situation is the fact
H that the Lo family had dissipated or at least divested itself of a substantial portion of its shareholding in Federal Paints. Out of the 19,460 issued shares of Federal Paints, 10,296 shares had been held by the Lo family holding company, Century Enterprises Co (Pte) Ltd, when the father of the petitioner ruled the roost. By 1982, all but some 296 of the 10,296 shares
I held by the Lo family holding company had been transferred to outsiders (ie who were not Hows, Foongs or Los), one of whom who has 5,000 of the shares, being one of the contributories moving these applications. Young J said in the *45 Flers Avenue* case,[3] 'it is always competent for the parties to alter their relationship'. With the Los locked in battle amongst themselves

and with the dilution of the shareholdings of the original three families and with the Lo family being left with only a minimal number of Federal Paints shares and with strangers coming into the company and holding over 50% of the equity of the company, it cannot but be that there is no question but that the relationship had been altered beyond recognition and that the quasi partnership, Federal Paints, had remetamorphosed to being an incorporated company not only in form but in fact as well. And that puts paid to the linchpin of the petitioner's case.

There are other aspects of the matter which demonstrate that there had been an alteration of the situation that had obtained. By para 41 of the petition, the petitioner points out that the company is doing well. For the petitioner, it was submitted that he had turned the company around 'working day and night' and now that there is money in the kitty the applicants want to get their hands on it. However, counsel for the applicants took issue on this submission and I think demolished it pointing out that in fact in 1978 and 1979, prior to the petitioner becoming the managing director, the profits made by the company were RM420,098 and RM363,519, respectively. Such accounts of the company as were before the court show that although in 1992, the company made a profit, during the regime with the petitioner at the helm, the company had in fact accumulated losses that amounted to over RM2m by 1992. It was also pointed out that the profit of RM151,473 in 1992 was as a result of 'fees' from subsidiaries of some RM200,000 and if not for such 'fees', the company would have registered a loss for that year as well. It is common ground that the company is still solvent but counsel for the applicants rounded off his submission on this aspect of the case by saying, 'One thing is clear — in 1979, he (the petitioner) inherited a company in the black. By 1992, it had substantial accumulated losses.' The accounts before the court appear to substantiate that submission. The track record of Federal Paints with the petitioner as managing director shows that there has been an alteration of the circumstances from the position that obtained before the management of the company fell into the petitioner's hands and that record puts paid to the suggestion that has been made that the applicants were being unfair in trying to get rid of the petitioner and lends support to the contention that the applicants in any event were justified in a commercial sense in getting rid of him.

The petitioner's reliance on a legitimate expectation to manage Federal Paints is clearly misplaced. What is disclosed in the petition itself shows this to be the position and having a trial of the issues raised will only prolong the inevitable. The applicants are entitled to have this petition nipped in the bud. They are entitled to the orders sought by encl (12) as were the applicants seeking similar orders in *Re A Company*.[4]

I pause to note that by encl (12), the applicants have asked for a permanent stay and not for the petition to be struck off. In *Re A Company*,[4] a permanent stay rather than a striking out was sought. Order 18 r 19 of the Rules of the High Court 1980 ('the RHC') provides the court with specific jurisdiction to have struck out proceedings that are, inter alia, frivolous or an abuse of the process. However O 1 r 2(2) provides that the RHC 'shall not have effect in relation to proceedings in respect of which rules have

A been made ... for the specific purpose of such proceedings ...'. The instant petition is, as has been seen, a s 218 winding-up petition in respect of which the Companies (Winding Up) Rules 1972 have been made. It seems to me that it follows that O 18 r 19 per se has no application to a s 218 petition. One has to look to the winding-up rules. Those rules do not per se empower the court to strike out a petition that is an abuse of the process. However, there is no doubt that the court has the inherent jurisdiction to strike out any abuse of its process.

In the s 181 Companies Act 1965 Petition No 28-8-93 in High Court No 5 of the Commercial Division of the High Court in Kuala Lumpur, where the applicants of encls (11) and (12) here are the petitioners, it is sought, inter alia, on the grounds that the petitioner here and some of the other directors aligned with him have been conducting the affairs of Federal Paints and exercising their powers as directors in a manner oppressive to the other members, that the petitioner and those directors be ordered to sell off such shares as they hold in the company to the other shareholders. The petitioners there had obtained an injunction restraining the petitioner here from, inter alia, functioning as managing director of the company until the general meeting of the company called for at the instance of the petitioners here to, inter alia, remove the petitioner from the board of the company, had been held.

The petitioner here concedes that with his opponents holding not less than 62% of the shares (he himself has only about 1% of the shares) it was going to be a foregone conclusion that he and his supporters would be duly removed from the board of Federal Paints. The petition he has caused to be presented here has been, it seems to me, nothing more than desperate and pointless reaching out for straws by a drowning man. The judge who heard the ex parte application for the appointment of a provisional liquidator did not have the benefit of the affidavits filed in opposition to the petition and to the application for a provisional liquidator. If he had, in all probability he would have arrived at the same conclusion as I have, that the petition ought to be stopped *in limine*. He would also in all probability have realized that the great reliance placed by the petitioner, in his application for the ex parte appointment of a provisional liquidator, on his contention that the company known as Sigma Coating BV that had entered into a licence agreement with Federal Paints would probably terminate the agreement because of the change in the management of Federal Paints, was not of any significant value because the licence agreement also provided that Sigma Coating BV was entitled to terminate the agreement in the event a provisional liquidator is appointed which fact, apparently, was not drawn to the attention of the court. Not disclosing to the court or drawing its attention to the fact that the suggested remedy for the malady could in fact kill the patient is a material non-disclosure.

I could find nothing in the affidavit in support of the application, other than the danger of Sigma Coating BV terminating the licence agreement because of the change of management, to support the application for the appointment and I could not find anything at all to justify the application being made ex parte. In *South Downs Packers Pty Ltd v Beaver*,[5] McPherson J said at p 994:

I should say at once that I can see little or no justification for the petitioner's action in applying as it did for the order ex parte. The registered office of the company is located in the city and the shareholders on both sides of the dispute had adopted a practice of communicating with each other by telex. That practice had, as the material before us discloses, continued until a time not long before the application was made. The appointment of a provisional liquidator has serious consequences both for the company and for those interested in it, and should not be made, at least in the case of an apparently solvent company, without notice to the company except in case of the most pressing urgency. *Re GJ Broadby v Vecon Pty Ltd* (1982) 7 ACLR 217; cf *Re Connolly Bros Ltd* [1911] 1 Ch 731 at p 742; *Edgar v Muscovitch* ([1914) 36 ALT 162. By that I mean that there should be cogent evidence that the delay involved in effecting service, or at least giving notice, of the application, or the very fact of notice itself, is likely to be such as to defeat the purpose of appointing a provisional liquidator.

In any event, I share the view of McPherson J in *South Downs Packers Pty Ltd v Beaver*[5] that the purpose for the appointment of a provisional liquidator is primarily to preserve the assets and otherwise maintain the status quo pending the determination of the petition to wind up the company. And particularly, as I have concluded that the petition has no hope of being successfully prosecuted, there is no call for allowing the appointment of the provisional liquidator to stand.

Now, s 226(3) of the Companies Act 1965 provides, inter alia, that when a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of court in accordance with such terms as the court imposes. The terms of s 226(3) suggest that the real reason for the petitioner presenting this petition and obtaining the order for the appointment of a provisional liquidator was to impede the petitioner in that other petition from proceeding with it.

In all the circumstances, I concluded that the petition was brought for a collateral purpose and in any event has not the remotest likelihood of being successfully proceeded with and ought to be stopped in its tracks. I was also of the opinion that there was no justification for seeking the appointment of a provisional liquidator and that taking out the application ex parte was in any event uncalled for.

The appointment of the provisional liquidator was set aside and the petitioner was ordered to pay the costs of the application, encl (11), to be taxed and paid forthwith. The petitioner, his servants or agents were ordered to be restrained from advertising or gazetting the petition and from further prosecuting it. The costs of encl (12) were ordered to be taxed and paid by the petitioner.

Order accordingly.

Reported by Anne Khoo